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No. 93-7407

In the Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT O'NEAL, PETITIONER

v.

FRED MCANINCH, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the State has the burden of proving a constitutional error to be harmless under *Brecht* v. *Abrahamson*, 113 S. Ct. 1710 (1993).

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INTEREST OF THE UNITED STATES

This case presents the question whether the State or the habeas petitioner bears the burden of proof on the issue of harmless error in a habeas corpus case, once the habeas petitioner has established that a constitutional violation has been committed. The United States has a substantial interest in the resolution of that question. Although this case arises from a habeas petition filed by a state prisoner pursuant to 28 U.S.C. 2254, many of the standards governing such petitions are similar to those governing collateral attacks by federal prisoners pursuant to 28 U.S.C. 2255. See, *e.g.*, *United States* v. *Frady*, 456 U.S. 152, 166, 169 & n.17 (1982). Because of its interest in

the circumstances under which federal prisoners may collaterally attack their convictions, the United States participated as amicus curiae in *Brecht* v. *Abrahamson*, 113 S. Ct. 1710 (1993). This Court's decision in *Brecht* provides the predicate for the question presented in this case.

STATUTE INVOLVED

28 U.S.Ct 2254(a) provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT

1. Petitioner was convicted after a jury trial in 1981 of aggravated murder, aggravated robbery, and kidnapping. The charges arose out of a scheme to kidnap and murder Henry Podborny, to steal Podborny's money and valuables, and to plunder his house and place of business.

Henry Podborny and his wife, "Dimple" Podborny, separated in 1980. Dimple became frightened that Henry would attempt to hurt her. She got in touch with her daughter-in-law by a prior marriage, Gail Toney, to see if Toney could help her obtain protection. Toney developed a scheme to frighten Dimple Podborny further, and then to extort money from Dimple for allegedly supplying protection. Ultimately, Dimple requested that Toney arrange to kill her estranged husband. J.A. 103-104.

As a result of the scheme, Dimple Podborny arranged for Henry Podborny to fly from his home in Chicago to

Cleveland so that he might meet with her to attempt to reconcile their marital differences. On January 29, 1981, Henry Podborny flew to Cleveland. Toney met him at the airport and dropped him off at petitioner's saloon, where he was told his wife would be waiting for him. He entered the saloon, but was never again seen alive by anyone other than petitioner and his co-defendants. J.A. 107-109.

On January 30, 1981, Toney, Dimple Podborny, and other co-conspirators drove to Chicago. They entered Henry Podborny's home and stole valuable items. They also went to Henry Podborny's place of business and opened the safe, but they did not find any money there. They then returned to Cleveland. During February and March, 1981, Toney and others attempted to obtain money from Henry Podborny's bank account. They also attempted to conceal his disappearance by writing letters that purported to be from Henry Podborny and through other schemes. Henry Podborny's partially decomposed body was found on April 24, 1981, in a field in Cleveland. J.A. 109-111.

2. Petitioner and five others were tried before a jury in state court. Petitioner was convicted of aggravated murder, aggravated robbery, and kidnapping. Substantial evidence was introduced against petitioner.

First, Toney testified at trial against petitioner. She stated that petitioner had been involved in the early stages of the plan to extort money from Dimple Podborny, and had made two trips to Chicago for that purpose. J.A. 105, 107. She also testified that she helped develop a plan under which petitioner would kidnap Henry Podborny and hold him in petitioner's saloon, while a group of co-conspirators would rob his house and place of business in Chicago. J.A. 107-108. She testified that a few minutes after she dropped Henry Podborny off at petitioner's saloon, petitioner came out of the saloon and entered her car, where

he gave her the victim's wallet, traveler's checks, credit card, and keys. J.A. 109. Toney testified that, during February and early March, 1981, petitioner told her that the victim was alive and that petitioner wanted money in return for holding the victim. J.A. 110.

Second, physical evidence showed that blood removed from various places in petitioner's saloon matched the blood found on the victim's shirt, and other physical evidence linked the murder to petitioner's saloon. Indeed, petitioner's counsel in closing argument conceded that the murder had taken place there. J.A. 157.

Third, a police officer testified that both petitioner and co-conspirator Lloyd Allen told him that they had been present when the victim had come to petitioner's saloon, and that petitioner had then gone outside and given the victim's money and valuables to Toney in her car. J.A. 156.

Fourth, Wilbur Higgins, an acquaintance of petitioner's, testified that, during the winter of 1981, he had seen petitioner and a co-conspirator parked near Higgins' house, but that petitioner had asked Higgins to leave because petitioner claimed he and the co-conspirator had women in the car with them. Higgins also testified that petitioner asked him to visit petitioner in jail on April 2, 1981; that petitioner confessed to Higgins that he had killed a man and put his body in a field near Higgins' house; and that petitioner asked Higgins to cover the body so that it would not be found. The body of Henry Podborny was in fact found in a field near Higgins' house. J.A. 159.

Petitioner's theory at trial was that Toney had access to petitioner's saloon, and that she and others had kidnapped and murdered the victim. J.A. 160. He denied having been involved in the murder, he denied having made inculpatory statements to the police, and he denied having told

Higgins that he had committed the murder. J.A. 160-161. Higgins himself admitted that he had not told the police of petitioner's admissions until he was arrested and held in jail for five hours, and he admitted telling defense counsel that he signed a statement for the police because they threatened that he would be charged with murder if he did not. J.A. 161. Finally, co-conspirator Allen testified that he was beaten to coerce him to sign a statement inculpating petitioner and himself. J.A. 160.

Petitioner's convictions were affirmed by the Ohio Court of Appeals. J.A. 83-98. The Ohio Supreme Court denied leave to appeal. See J.A. 1.

3. On September 24, 1986, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Ohio. The case was referred to a magistrate, who rejected a number of the grounds petitioner proffered for habeas relief. See J.A. 111-115 (rejecting petitioner's claim that he had been entitled to a trial severance); J.A. 115-121 (rejecting petitioner's Confrontation and Compulsory Process Clause claims); J.A. 162-167 (rejecting petitioner's claim that the Ohio appellate court had failed to address one of his claims).

The magistrate found, however, that the jury instructions had the effect of relieving the State of its burden of proof on the element of intent, in violation of the Due Process Clause. The magistrate explained that, under Ohio law, a co-conspirator or aider and abettor is liable for an aggravated felony, if he knew that the felony and the manner of its accomplishment would be reasonably likely to produce death. J.A. 126-127. In this case, the magistrate found that the trial court had properly charged the jury on that theory when it instructed:

> [W]here you have an unlawful act contemplated in the original conspiracy, although not identical with or

> similar to the criminal act charged in the indictment, if the defendants conspired to commit an unlawful act, and the manner in which it was performed was reasonable [sic] or likely to produce the death of another, then each conspirator, or aider and abettor is equally guilty as the principal offender of the homicide.

J.A. 127. But the magistrate found that elsewhere the instructions referred to the intent of "the defendants and/or co-conspirators, or aiders and abettors," and thereby (according to the magistrate) let the jury believe that it need only find the necessary intent for one principal in order to find that all accomplices and co-conspirators were guilty. See, *e.g.*, J.A. 67, 70, 73, 183.

The magistrate found that the prosecutor had compounded the error in his closing argument by stating:

> The State is bound to prove to a jury two things. First, that the crimes alleged have been committed. * * * The next thing we're bound to prove to you is that those accused of the crime participated in a criminal conduct and engaged in a course of criminal conduct which eventually led to the commission of those crimes.

J.A. 58. Petitioner's objection to that statement had been overruled. The magistrate found that the prosecutor's statement had the effect of emphasizing the problem in the jury instructions, so that a reasonable juror could find petitioner guilty without finding that the State had proven that he had the necessary intent, as defined by Ohio law. J.A. 130-131.

The magistrate also found that a number of other errors had been committed, the cumulative effect of which amounted to a fundamentally unfair trial, in violation of the Due Process Clause. Among those errors were the

admission in evidence of photographs of the decomposed body of Henry Podborny, the bloodstained clothes the body was wearing, some skin from the victim's hand (ostensibly to show the fingerprints and thus identify the corpse), and a crowbar found in petitioner's bar that was not shown to have anything to do with the murder. The magistrate found that all of that evidence (except the crowbar) was relevant, but that it was unduly prejudicial and cumulative under Ohio law. See J.A. 132-139. In addition, the magistrate found that the prosecutor improperly questioned petitioner about a prior homicide, see J.A. 139-148, and that the prosecutor's closing argument was unduly inflammatory, see J.A. 148-151.

Finally, the magistrate recognized that habeas relief could be granted only if the above errors were not harmless. But he concluded that, taken together, they were not. J.A. 151-162.

4. The district court initially requested a supplemental report from the magistrate concerning the relevance, if any, of the standard federal conspirator liability instruction, derived from *Pinkerton* v. *United States,* 328 U.S. 640 (1946), to the magistrate's conclusion in this case. See J.A. 191-193. The magistrate issued a supplemental report, J.A. 201-210, essentially repeating his prior findings and stating that the problem in this case was "that [petitioner] could be found guilty of the crimes of kidnapping, robbery and murder simply based on his participation in a conspiracy to obtain money from either Mrs. or Mr. Podborny that eventually led to the commission of the offenses." J.A. 206-207. Although the magistrate stated that the trial court might have dispelled the problem in its instruction on aggravated murder, it had not done so in its instructions on aggravated robbery or kidnapping. J.A. 207-208. Moreover, the magistrate continued to believe that the trial was fundamentally unfair, in violation of the

Due Process Clause, because of the various evidentiary and other errors that he believed had been committed. J.A. 209-210.

The district court accepted the magistrate's report and granted the writ, on the grounds of "defective instructions, the prosecutor's prejudicial misconduct, and the admission of certain prejudicial evidence," in violation of the Due Process Clause. J.A. 213-214.

5. The court of appeals reversed. J.A. 217-229. The court rejected the district court's determination that the prosecutor's statements during closing argument and the improper admission of evidence rendered the trial fundamentally unfair, concluding that those errors "were at most errors in the application of state law." J.A. 228. That left the allegedly improper jury instructions, coupled with the prosecutor's reference to accomplice liability in his closing argument, as the sole basis for the grant of habeas relief.

The court of appeals stated that the district court had applied the wrong standard in evaluating the jury instructions. J.A. 222. The question should not be whether a reasonable juror "could have interpreted" the instructions to shift the burden of proof (the standard the district court applied), but rather " 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Ibid.*, quoting *Estelle* v. *McGuire*, 112 S. Ct. 475, 482 & n.4 (1991).

Applying the correct standard, the court held that "the [trial] court's reference to 'defendants or co-defendants or aiders and abettors' appears to be nothing more than an unartful boilerplate reiteration that the same individuals could be found guilty *either* as principals * * * or as 'aiders and abettors.' " J.A. 224. The court also quoted the portion of the instructions in which the trial court correctly charged the jury on accomplice liability. J.A. 225-226.

The court "conclude[d] that petitioner has not demonstrated a reasonable likelihood that the jury interpreted the instructions, taken as a whole, to permit petitioner's conviction without proof that he himself had the requisite intent to kill." J.A. 226.

The court of appeals then adverted to the prosecutor's misstatement of the law during closing argument, which did appear to suggest that the petitioner's own intent was unimportant. The court stated that the district court's overruling of the objection to the prosecutor's remark "improperly suggested that the prosecution need not make an independent showing of intent as to each defendant in order for conspiracy liability to attach." J.A. 227. But, the court held, "even if this remark, in conjunction with any confusion engendered by the court's instructions on mens rea, could be said to have abridged petitioner's constitutional rights," the error was harmless, under the "substantial and injurious effect or influence in determing the jury's verdict" standard adopted by this Court in *Brecht* v. *Abrahamson*. J.A. 227-228.

The court had stated earlier in its opinion that petitioner had the burden, under *Brecht*, of showing lack of harmlessness. J.A. 221. Upon review of the evidence, the court found that "all of the evidence upon which the jury could have relied to establish petitioner's guilt pointed to his guilt as a principal." J.A. 227. Accordingly, the court concluded, even if an error had been committed, it was harmless and habeas relief should not be granted. J.A. 228.

SUMMARY OF ARGUMENT

Before a federal court may grant habeas relief on the ground that the habeas petitioner's trial was tainted by "trial-type" constitutional error, the court must determine not only whether the error occurred, but also whether it

was harmless. In *Brecht* v. *Abrahamson*, 113 S. Ct. 1710 (1993), this Court clarified that the question of harmlessness on collateral review is governed by the standard announced in *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946): whether the error "had substantial and injurious effect or influence in determining the jury's verdict." The question in this case is whether the State or the prisoner bears the burden of proof on that issue.

In our view, the burden of proof—or, what is the same in this context, the burden of persuasion—is appropriately placed on the habeas petitioner. That conclusion follows naturally from the ordinary rule that the plaintiff in a civil action bears the burden of persuasion as to every element of his claim. A habeas petitioner is a civil plaintiff, and the success of his action depends on a showing that he is "in custody in violation of the Constitution." 28 U.S.C. 2254(a). A mere showing that there has been a constitutional violation will thus ordinarily be insufficient; what must be shown is that there was a link between the petitioner's custody and the violation—*i.e.*, that the violation was not a mere harmless error. Accordingly, lack of harmlessness is appropriately seen as an element of the habeas petitioner's case, on which the habeas petitioner therefore bears the burden of persuasion.

That result also follows from fundamental principles concerning collateral attack on criminal convictions. The costs of granting habeas relief are high. It disserves the State's interest in the finality of criminal convictions. It detracts from the focus on the trial and direct review as the primary fora for resolving all relevant issues. It denigrates the ability of the trial and appellate courts to adjudicate constitutional claims, and perhaps discourages them from taking seriously their duty to do so. Since there is no time limit on filing for habeas relief, the retrial that will be necessary when such relief is granted often will pose a

substantial risk that a guilty defendant will go free due to the fading of memory or the unavailability of evidence. In light of those substantial costs, unless the habeas court can affirmatively determine that the error did have an effect on the judgment pursuant to which the prisoner is confined—*i.e.*, unless the court determines the error was not harmless—habeas relief ought not be granted.

Petitioner's rationale for requiring the State to bear the burden of persuasion on this issue is unconvincing. Requiring the habeas petitioner to bear the burden of persuasion on harmlessness is consistent with other decisions of this Court that have recognized the important distinctions between direct review and collateral attack—even where the issue, as in *Brecht* and this case, involved harmless error. Moreover, the rule we advocate comports with the customary procedures used in habeas cases and does not render the litigation of such cases unwieldy or unfair. Regardless of how the burden of persuasion is allocated, the issue of harmless error will inevitably be litigated in habeas cases; both parties will inevitably argue their views of the record to the court; and the court will ultimately be obliged to review the entire record to make a harmless error determination. The issue in this case is one of substance, not procedure: whether the court must grant habeas relief when, at the end of the litigation, it is in equipoise on the harmless error issue. There is no reason to believe that the resolution of that question will have any effect on the difficulty of adjudicating habeas claims.

ARGUMENT

A. THE HABEAS PETITIONER SHOULD BEAR THE BURDEN OF PROOF ON THE ISSUE OF HARMLESSNESS

1. It has long been established that a federal habeas court may not grant relief to a prisoner on the basis of a

"trial error," see *Arizona* v. *Fulminante,* 499 U.S. 279, 307 (1991), if it finds that the error was harmless. See, *e.g.*, *Yates* v. *Evatt,* 500 U.S. 391, 402 (1991); *Rose* v. *Clark,* 478 U.S. 570 (1986); *Rushen* v. *Spain,* 464 U.S. 114, 117-118 & n.2 (1983); *Hopper* v. *Evans,* 456 U.S. 605 (1982); *Milton* v. *Wainwright,* 407 U.S. 371 (1972); *Chambers* v. *Maroney,* 399 U.S. 42, 52-53 (1970). Thus, harmless error review is an inescapable part of adjudicating most types of constitutional claims on collateral attack of a criminal conviction.

In *Brecht* v. *Abrahamson,* 113 S. Ct. 1710, 1714 (1993), this Court explained that, in the habeas context, the standard governing the harmless error analysis is the standard employed by the Court in *Kotteakos* v. *United States,* 328 U.S. 750, 776 (1946): whether the error "had substantial and injurious effect or influence in determining the jury's verdict." The question presented in this case is whether the State or the habeas petitioner bears the burden of making that showing.

2. Initially, we note that the question presented in this case is a narrow one. The term "burden of proof" has been used to refer to two different concepts. The more common and more recent use of the term refers to the "burden of persuasion"—the "notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose." *Director, Office of Workers' Compensation Programs* v. *Greenwich Collieries,* No. 93-744 (June 20, 1994), slip op. 5. But it has also been used to refer to the "burden of production"—"a party's obligation to come forward with evidence to support its claim." *Ibid.*

The question presented in this case concerns only the burden of persuasion. Both parties in a habeas case will, in the ordinary case, attempt to convince the court that an error was (or was not) harmless by means of references to the record and legal argument. But the "evidence" on the

basis of which a habeas court will decide the harmless error issue ordinarily consists simply of the record of the original trial. Since no additional evidence ordinarily need be introduced—and since the record of the trial will already have been placed before the habeas court in the course of litigation concerning whether a constitutional error was committed—there is no occasion for allocating a burden of production of evidence concerning harmless error. Thus, the only burden to allocate with regard to harmless error is the burden of persuasion—*i.e.*, whether the State or the prisoner wins in the unusual case in which a court is in equipoise as to whether the error is harmless.

3. The ordinary rule governing the allocation of the burden of persuasion is that the plaintiff bears the burden of persuasion on every issue necessary to make out his claim. As Dean McCormick explained, that is because "the plaintiff * * * generally seeks to change the present state of affairs and * * * therefore naturally should be expected to bear the risk of failure of proof or presentation." 2 *McCormick on Evidence* § 337, at 428 (J. Strong ed., 4th ed. 1992). That rule is applied in areas from tort law, where the plaintiff bears the burden of persuading the trier of fact as to both negligence and causation, see, *e.g.*, 5 Stuart Speiser, Charles Krause & Alfred Gans, *The American Law of Torts* § 18:41, at 763, 764 (1988), to the law of employment discrimination, where a long line of this Court's precedents have established that, regardless of the fact that burdens of production may shift, the plaintiff at all times bears the ultimate burden of persuasion. See, *e.g.*, *United States Postal Serv. Bd. of Governors* v. *Aikens,* 460 U.S. 711, 716 (1983); *Texas Dep't of Community Affairs* v. *Burdine,* 450 U.S. 248, 256 (1981). Indeed, as this Court recently explained in *Greenwich Collieries,* the Administrative Procedure Act codified this principle in Section 7(c), 5 U.S.C. 556(d), which provides that "the pro-

ponent of a rule or order has the burden of proof." See *Greenwich Collieries,* slip op. 9.

A habeas corpus action is a separate proceeding in which the petitioner is in the position of a plaintiff. The allegation the habeas petitioner must make in order to obtain relief is provided by 28 U.S.C. 2254(a): federal courts are given authority by that provision to "entertain an application for a writ of habeas corpus" by a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." It is only on that basis that a federal court may grant habeas relief.

That bedrock criterion for habeas relief requires proof of two facts. First, there must have been a violation of the Constitution, which is ordinarily the only source of federal law whose violation in a state criminal proceeding could warrant exercise of a federal court's habeas jurisdiction. See *Davis* v. *United States,* 417 U.S. 333, 346 (1974) (habeas relief available only for "a fundamental defect which inherently results in a miscarriage of justice"). But cf. *Kirk* v. *Finkbeiner,* 474 U.S. 929 (1985) (White, J., dissenting from denial of certiorari). Second, the habeas petitioner must be "in custody." But those facts are linked in the statutory phrase, rather than entirely separate and independent. Nor does it satisfy the meaning of the phrase "in custody in violation of the Constitution" merely to require that the constitutional violation must have occurred in the course of the trial that led up to the conviction pursuant to which the petitioner is in custody. See, *e.g.*, *Maleng* v. *Cook,* 490 U.S. 488 (1989) (per curiam). Instead, the requirement that the prisoner be "in custody in violation of the Constitution" requires a link between the constitutional violation and the custody: the constitutional error must not merely have occurred at the prisoner's trial, but it must have resulted in the prisoner's current custody.

Where an error is harmless—*i.e.*, where it had no "substantial and injurious" effect on the verdict—it cannot be said to have resulted in the prisoner's custody. Therefore, proof of the requisite causal relationship—*i.e.*, proof of a lack of harmlessness—is most naturally regarded as a necessary part of the proof of the core statutory criterion for habeas relief—that the petitioner is in custody in violation of the Constitution. It follows that the burden of proving that fact is most naturally placed on the habeas petitioner.

4. The conclusion that the habeas petitioner bears the burden of persuasion on the issue of harmlessness is reinforced by fundamental principles concerning the nature of collateral review of criminal convictions. As this Court has repeatedly emphasized, granting habeas relief imposes a heavy cost on society. It directly frustrates the public interest in the finality of criminal convictions, which is essential to the "deterrent effect" of the criminal law, see *Teague* v. *Lane,* 489 U.S. 288, 309 (1989) (plurality opinion), and without which "[n]either innocence nor just punishment can be vindicated." *McCleskey* v. *Zant,* 499 U.S. 467, 491 (1991). "[T]he deterrent force of penal laws is diminished to the extent that persons contemplating criminal activity believe there is a possibility that they will escape punishment through repetitive collateral attacks." *Kuhlmann* v. *Wilson,* 477 U.S. 436, 452-453 (1986) (plurality opinion).

Granting habeas relief also "degrades the prominence of the trial itself," *Engle* v. *Isaac,* 456 U.S. 107, 127 (1982), as the primary forum for resolution of all legal and factual issues regarding the charges against the defendant. Not only does it encourage the litigants to focus their attention away from the "main event" to the collateral proceedings that may follow, *Wainwright* v. *Sykes,* 433 U.S. 72, 90 (1977), but it also denigrates the ability of the original trial

and appellate courts to enforce the federal constitution. See, *e.g.*, *Brecht*, 113 S. Ct. at 1721.

Finally, the belated retrials that result from granting habeas relief—in this case, a retrial if required would take place some 14 years after the offense and the original trial—seriously undermine the capacity of the judicial system to fulfill its primary, truth-seeking function. "[W]hen a habeas petitioner succeeds in obtaining a new trial, the erosion of memory and dispersion of witnesses that occur with the passage of time * * * prejudice the government and diminish the chances of a reliable criminal adjudication." *McCleskey* v. *Zant*, 499 U.S. at 491 (internal citation and quotation marks omitted); *Engle* v. *Isaac*, 456 U.S. at 127-128; Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 147 (1970).

In light of those costs, this Court has limited the availability of collateral review and has distinguished between direct and collateral review in a variety of circumstances. See *Brecht*, 113 S. Ct. at 1720 (citing cases). It is appropriate to do so in this case as well. The question presented in this case arises only where the habeas court is in equipoise as to whether a constitutional error did or did not affect the verdict at the prisoner's trial. On direct review, it is reasonable to conclude that in that situation of equipoise a new trial should be ordered—at least where the defendant properly raised and preserved the claim of error. See *United States* v. *Olano*, 113 S. Ct. 1770, 1778 (1993). But on habeas, a prisoner who has already had the benefit of direct review is now bringing an independent action seeking to overturn his conviction. At that stage, if the court is in equipoise on the issue of harmlessness, it is reasonable to conclude that the "extraordinary remedy" afforded by habeas corpus is not available. See *Brecht*, 113 S. Ct. at 1719. Unless the habeas court can affirmatively determine

that the error *did* have an effect on the judgment pursuant to which the prisoner is committed, it does not violate "fundamental fairness," *ibid.*, quoting *Engle* v. *Isaac*, 456 U.S. 107, 126 (1982), to conclude that the prisoner has failed to establish his entitlement to relief.

B. REQUIRING THE HABEAS PETITIONER TO BEAR THE BURDEN OF PROOF AS TO HARMLESSNESS FOLLOWS FROM THIS COURT'S RECENT CASES AND COMPORTS WITH CUSTOMARY PROCEDURES IN LITIGATING HABEAS CORPUS CASES

1. Petitioner contends that "the central focus of this Court's modern habeas jurisprudence is the writ's assurance that constitutional errors do not cause the conviction of an actually innocent person," Pet. Br. 30, and that placing the burden of persuasion as to harmlessness on the habeas petitioner would contravene that principle.

Petitioner's premise is mistaken. The touchstone of the Court's recent habeas jurisprudence is recognition that "the writ of habeas corpus has historically been regarded as an extraordinary remedy, a bulwark against convictions that violate fundamental fairness" as a result of a constitutional error. *Brecht*, 113 S. Ct. at 1719 (internal quotation marks omitted); see also *Herrera* v. *Collins*, 113 S. Ct. 853 (1993). Where it is fundamentally unfair to continue to hold a prisoner in confinement—such as "where a constitutional violation has probably resulted in the conviction of one who is actually innocent," *Murray* v. *Carrier*, 477 U.S. 478, 496 (1986)—the Court has indicated a willingness to relax otherwise applicable rules that may limit the claims available to a habeas petitioner. See, *e.g.*, *Sawyer* v. *Whitley*, 112 S. Ct. 2514, 2518 (1992); *Teague* v. *Lane*, 489 U.S. at 311-313; *Kuhlmann* v. *Wilson*, 477 U.S. 436, 455 & n.17 (1986). But this case concerns how a habeas petition is to be treated in precisely those cases in which

it *cannot* be said that the habeas petitioner has shown that the constitutional error "probably resulted in the conviction of one who is actually innocent." For the Court's allocation of the burden of persuasion will *only* affect cases in which the habeas court is in equipoise as to whether the verdict would or would not have been affected had the claimed constitutional error not occurred. By definition, none of those cases will be ones in which the habeas petitioner has made a showing that, though he was innocent, a constitutional error probably resulted in his conviction.

Moreover, in light of the variety of interests that are protected by constitutional rules, there will undoubtedly be cases in which the harmless error inquiry and the question of actual innocence will not be at all parallel. Thus, there may well be cases in which a constitutional error occurred and was found not to be harmless, but in which the error casts little doubt on the habeas petitioner's guilt of the underlying crime. See, *e.g.*, *Kimmelman* v. *Morrison*, 477 U.S. 365, 379-380 (1986); *Rose* v. *Mitchell*, 443 U.S. 545 (1979). In short, allotting to the habeas petitioner the burden of persuasion on the issue of harmless error is reinforced by this Court's recent cases recognizing the limits of habeas review, and it is not at all inconsistent with the Court's recognition of the "actual innocence" exception to those limits. Indeed, the decision in *Brecht* to apply a less rigorous form of harmless error analysis on habeas itself establishes that conclusion.

2. Petitioner also argues that allocating the burden of proof as to harmlessness to pro se habeas petitioners would needlessly complicate the process of resolving their claims. In this regard, petitioner argues that courts will be required to "seek out a lay petitioner's facts and arguments on the harmless error issue," and to create "an incentive, or even * * * a legal requirement on the part of petitioners

to demonstrate harm as to every claim in every petition." Pet. Br. 37.

Petitioner's fears are unfounded. The "evidence" as to harmlessness, which will ordinarily consist of the record of the original trial, will be entirely before the court, regardless of how the burden of persuasion as to harmlessness is allocated. Because neither party thus has to introduce any evidence as to the harmless error issue, arguments about which party has superior access to the evidence or superior ability to bring it before the court are entirely beside the point. Regardless of how this case is decided, in cases in which the harmless error issue is potentially dispositive, both parties will have every incentive to argue before the court for their interpretations of the record and the court, having heard the argument, will have to review the entire record and make the ultimate judgment as to harmlessness.

Nor is the order of proof in habeas cases likely to be affected by the Court's decision in this case. At present, habeas courts are free to decide the harmless error issue prior to deciding the merits if proceeding in that way appears to be most convenient. Nothing in the allocation of the burden of persuasion as to harmless error is likely to change that. Nor is there any reason to believe that the technical rules of pleading or practice in habeas cases would be altered by the Court's decision in this case.

3. Finally, petitioner argues (Pet. Br. 39-42) that allocating the burden of persuasion as to harmlessness to habeas petitioners would in effect impose the same burden of "prejudice" on all habeas petitioners as current law imposes on habeas petitioners who have procedurally defaulted on their claims or who have abused the writ. See *Wainwright* v. *Sykes*, 433 U.S. at 87-89; *McCleskey* v. *Zant*, 499 U.S. at 468.

Petitioner is mistaken on this point as well. The "prejudice" standard that must be satisfied under *Sykes* or *McCleskey* is substantially more rigorous than the harmless error standard at issue in this case. To show prejudice that would sustain a habeas petition containing defaulted or abusive claims, the petitioner must show "not merely that the errors at * * * trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Murray* v. *Carrier,* 477 U.S. at 494 (internal quotation marks omitted). By contrast, under the *Kotteakos* harmless error standard adopted by this Court in *Brecht,* an error is not harmless if it "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht,* 113 S. Ct. at 1722.

An example will illustrate the difference between the two standards. A habeas petitioner may, depending on the facts, be able to satisfy the *Kotteakos* harmless error standard by showing that a non-*Mirandized,* though voluntary and intelligent, confession was admitted at his trial; if so, the petitioner may obtain habeas relief if his claim was properly raised and preserved. See *Withrow* v. *Williams,* 113 S. Ct. 1745 (1993). But a habeas petitioner who had defaulted on such a claim probably could not obtain relief under the "prejudice" prong of the *Wainwright* v. *Sykes* standard, for it may not be "fundamentally unfair" for his conviction to rest in part on the basis of a voluntary and intelligent confession.

In any event, even if the harmless error inquiry and the "prejudice" prong of the *Sykes/McCleskey* cause and prejudice standard were more similar than they are, imposing the burden of proving harmless error on all habeas petitioners who allege trial error would have little impact on the incentives for either party to raise claims at the earliest opportunity. A prisoner of course could always benefit by

bringing his claim at the first opportunity, because he would thereby be relieved of the burden of proving "cause" for his default or abuse and because he would be likely to want to avoid unnecessary time in confinement.

4. The court of appeals' decision should be affirmed. The court stated that "[t]he habeas petitioner bears the burden of establishing" harmless error. J.A. 221. The only error that the court of appeals identified—and, as we read the court of appeals' opinion, it merely accepted *arguendo* that the error had been committed—was the possibility that the prosecutor's closing argument, coupled with some confusion in the court's instructions, may have left the jury misinformed about the proper standard for accomplice liability under Ohio law. See J.A. 227. But the court found that the alleged error was in any event harmless because "all of the evidence upon which the jury could have relied to establish petitioner's guilt pointed to his guilt as a principal." *Ibid.*

In light of the court of appeals' conclusions, even if this Court were to decide that the State must bear the burden of persuasion as to harmlessness, there would be a substantial argument that the State had satisfied that burden. But that question need not be reached in this case. Since the court of appeals applied the appropriate standard for proving harmlessness and correctly placed the burden of persuasion on the issue on petitioner, the court of appeals' decision should be upheld.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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